Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

IN THE MATTER OF	
AMENDMENT OF PART 1 OF THE COMMISSION'S RULES -- COMPETITIVE BIDDING PROCEEDING	WT 97-82

To The Commission:

PETITION FOR RECONSIDERATION

Pursuant to Section 405(a) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. 405(a), and Commission Rule 1.106, 47 C.F.R. §1.106, Airadigm Communications, Inc. ("Airadigm"), Loli, Inc. ("Loli"), KMC Interactive ("KMC"), New Wave PCS ("New Wave"), AmeriCall International, L.L.C. ("AmeriCall"), MAR IVDS, Inc. ("MAR"), and Euphemia Banas ("Banas") (collectively, the "Petitioners"), acting through counsel, hereby request that the Commission reconsider its Order of February 20, 1997, scheduled to become effective on April 21, 1997 (the "Order").

I. BACKGROUND

The Commission adopted the rules contained in the Order, which changed substantive rules, without public notice and comment on the rule changes. Of particular significance to the Petitioners is the Commission's intended rule change regarding licensee installment payment plans, and the security agreements associated therewith under the Commission's new rule 1.2110(e)(3).

In October 1996, the Commission -- without prior notice -- sent to C-block PCS licensees an Installment Payment Plan Note (the "Note") and a Security Agreement (the "Agreement"), which the PCS licensees were required to sign if they desired to maintain their status as licensees. Commission Rule 1.2110(e) mentioned nothing about security agreements or promissory notes. 47 C.F.R. §1.2110(e). Certain of the Petitioners were part of a group that objected to the new terms created by the Note and the Agreement. However, the Commission threatened that the Petitioners would lose their licenses if the Petitioners did not sign the Note and Agreement. The Note and Agreement created a security interest in the License for the Commission and referred to the Uniform Commercial Code for interpretation.[1] In October 1996, the Commission also indicated that IVDS licensees could expect to have similar security agreements and promissory notes to be imposed upon them.[2]

Several months later, the Commission now seeks to expand its security interests with the Order, which amends Commission Rule 1.2110(e)(3) as follows: "Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan." Thus, the Commission mandated that licensees in the future be subject to the same Note and Agreement to which C-block PCS licensees had been subjected. In the Order, the Commission stated that the amendments adopted therein pertain to agency practice and procedure, and that as such, the requirements of notice and comment rulemaking did not apply.[3]

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1 Security Agreement at 2.

2 See October 17, 1996 Letter to Michael J. Kilroy, In-Sync Interactive, from Michele Farquhar, Chief, Wireless Telecommunications at 2, attached as an exhibit to this Petition.

3 "The Amendments adopted herein pertain to agency procedure and practice. Consequently, the requirements of notice and comment rule making . . . do not apply." Order at

Thus, the Commission ordered that these changes go into effect on April 21, 1997, without soliciting or receiving comment from any of the affected licensees.

II. BY CHANGING THE NATURE OF SECURITY AGREEMENTS REQUIRED BY LICENSEES, THE COMMISSION SUBSTANTIVELY ALTERED LICENSEES' OBLIGATIONS. AS SUCH, NOTICE AND COMMENT WERE REQUIRED.

A. Notice and Comment Is Required For Changes In Agencies.

The Administrative Procedures Act ("APA") requires public participation in changes to agency policy, with a few exceptions that "are not to be favored and [which] will be used sparingly." Analysas Corp. v. Erskine Bowles, 827 F. Supp. 20, 22 (D.D.C. 1993). Public notice and comment are generally required for any changes, with limited exceptions. One exception from notice and comment is for "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. §553(b)(A). It is under this rubric that the Commission attempts to exempt its Order from public notice and comment. The Commission asserts that under JEM Broadcasting v. FCC, 22 F.3d 320 (D.C. Cir. 1994), the Order does not require notice and comment because the Order merely changes agency procedure and practice. In JEM Broadcasting, the court of appeals for the District of Columbia held that the Commission's "hard look" rule, which did not change substantive standards by which Commission applicants were evaluated, was procedural; thus, notice and comment were not required. Id. at 327.

However, even the language of JEM Broadcasting itself does not support the Commission's assertion regarding the Order. JEM Broadcasting held that a critical feature of the

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procedural exemption is "that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." Id. at 326 (citing Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980)). As discussed below, the changes that the Order seeks have much more profound effect on the rights and interests of licensees than contemplated by the JEM Broadcasting standard.

Further, case law beyond the ambit of Commission law supports the notion that public notice and comment is a critical component to administrative procedure and not to be dispensed with lightly. In Analysas Corp., the district court for the District of Columbia held that a Small Business Administration's ("SBA") interim final rule regarding the definition of "emerging industry" did not fall within the procedural exception to notice and comment. The SBA, like the Commission in the instant case, claimed that its new definition of "emerging industry" was a mere internal procedural modification. The Analysas Corp. court disagreed with the SBA, stating that it took a "dim view of rule-making which has not been preceded by notice and comment . . . [and that] there is no indication (even when the facts are read in the light most favorable to defendants) that the public interest justified foregoing the clear mandate of the . . . APA." Id. at 23-24.

When the Interstate Commerce Commission ("ICC") claimed that its Notice of Elimination was procedural and thus did not require public notice and comment, the Fifth Circuit disagreed. Brown Express, Inc. v. United States, 607 F.2d 695, 700 (5th Cir. 1979) held that an agency's own statement characterizing its action as procedural is not dispositive in determining whether the action falls into the notice and comment exception. In disagreeing with the ICC that

the Notice of Elimination would have little adverse effect, if any, on applicants, carriers, or shippers, the court first stated the underlying rationale for the notice and comment requirement: an agency's judgment could only be as good as the information it drew from a broad base of affected subjects. Id at 701. Next, the Court articulated the test for the internal procedural rule exemption:

> [W]hen a proposed regulation of general applicability has a Substantial [sic] impact on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided . . . The exemption of section 553(b)(A) does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated . . . Our inquiry, therefore, is not whether the rule is 'substantive' or 'procedural,' but whether the rule will have a 'substantial impact' on those regulated.

Id. As discussed below in Part II(B), the Order fails the Brown Express test.

When the Health and Human Services agency attempted to circumvent notice and comment procedures, the court of appeals for the District of Columbia held that "notice and comment 'guarantees would not be meaningful if an agency could effectively, constructively amend regulations by means of nonobvious [sic] reasoning without giving the affected parties an opportunity either to affect the content of the regulations at issue or at least be aware of the scope of their demands.' " National Family Planning and Reproductive Health Ass'n, Inc. v. Louis W. Sullivan, 979 F.2d 227, 240 (D.C. Cir. 1992) (citing Secretary of Labor v. Western Fuels-Utah, Inc., 900 F.2d 327 (D.C. Cir. 1990), Edwards, J., dissenting). Thus, the APA language itself and relevant case law interpretation all support the conclusion that side-stepping required notice and comment is a serious matter, which agencies should not exercise at will.

B. The Order Substantively Change Licensees' Rights and Interests.

Under the language of the APA itself and the tests articulated by the case law above for an agency's adherence to notice and comment procedures, notice and comment should have been required for the Order. The Commission seeks to create a prioritized security interest for itself, over all other potential creditors. This change would be particularly damaging to small licensees, who have fewer assets and fewer financing choices. Indeed, these licensees are likely to attract fewer investors when the Commission has a primary security interest in the License. Indeed, funding for such small licensees could entirely evaporate once other creditors recognize the impact resulting from the Order.

The creation of a security interest between the Commission and a licensee for the benefit of the Commission changes the fundamental nature of the creditor relationship.[4] Once a creditor has a security interest in property, that interest has priority over unsecured interests in the same property.[5] Thus, once the Note and Agreement are executed, the Commission has vaulted itself to the front of the creditors' line.

> A secured party is: a lender, seller or other person in whose favor there is a security interest . . . A security interest is: an interest in personal property or fixtures which secures payment or performance of an obligation . . . Conversely, an unsecured party is a creditor to whom money is owed, but

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[4] See e.g., U.C.C. §9-105(1)(m), U.C.C. §1-201(37), U.C.C. §9-201.

[5] "Article 9 of our Uniform Commercial Code establishes a priority system for determining the rights of parties who claim competing interests in secured property . . . As a general rule, the holder of a perfected security interest has an interest in the secured property, and the proceeds from the sale thereof, which is superior to the interests of unsecured creditors of the debtor and subsequent purchasers of the secured property." Barbara F. Herman v. First Farmers State Bank of Minier, 392 N.E.2d 344, 345 (Ct. App. Ill. 1979). See United States v. Fullpail Cattle Sales, Inc. and Commercial State Bank, 640 F. Supp. 976, 982 (E.D. Wisc. 1986) ("[t]he defendants' interest is perfected and unsecured; the plaintiff's is perfected and secured. As between secured and unsecured creditors, the secured party prevails.") See also, Henry Wilson v. M&W Gear, 442 N.E.2d 670, 672 (Ill. Ct. App. 1982).

> who is not granted a security interest in property. There is a naked debt; nothing more.

In Re David Jay Ray, 26 B.R. 534, 544 (Bankr. D. Kan. 1983) (citations omitted; rev'd on other grounds, Chandler Bank of Lyons v. Ray, 804 F. 2d 577 (10th Cir. 1986)).

First, the Commission forced PCS licensees to alter the Commission's status from unsecured creditor to secured creditor, with its Note and Agreement. Now the Commission is changing its rules to substantively alter the creditor relationship between all licensees and the Commission, under the rubric of procedural change. Note and comment should have been required before PCS licensees were forced to sign; it certainly should be required now that a global change has been mandated.

The Brown Express test asks whether the rule will have a substantial impact on those regulated. Brown Express at 700. Changing the priority of creditors for small licensees will, of course, have a substantial impact on those licensees. Regardless of the Commission's attempts to frame their efforts under a procedural guise, licensees' other creditors will be aware of the Commission's new status, and consequently be less likely to extend credit to small licensees with limited resources. It would be unreasonable for the Commission to argue that the creation of financial hardship for its licensees is an insubstantial change.

As also discussed above, the Commission's strong-armed change of its rule without notice and comment fails even the rubric of the JEM Broadcasting case. In JEM Broadcasting, the court held that a critical feature of the procedural exemption is "that it covers agency actions that do not themselves alter the rights or interests of parties, although it my alter the manner in which the parties present themselves or their viewpoints to the agency." JEM Broadcasting at 326. Creating a security interest where none previously existed does not alter the manner in

which parties present their viewpoints. It fundamentally alters the relationship between the Commission and the licensee. All this, the Commission does in the name of procedural change.

III. EVEN IF THIS ORDER IS ULTIMATELY DETERMINED TO BE ACCEPTABLE, DESPITE THE LACK OF NOTICE AND COMMENT, IT SHOULD ONLY HAVE PROSPECTIVE APPLICATION.

Even if the Commission determines that its Order was appropriately promulgated, without notice and comment, the Note and Agreement should only have prospective application. The legal framework governing administrative law specifically precludes retroactive application of rules. The Administrative Procedure Act ("APA") defines a rule as having only a future effect: " . . . the whole or part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4) (emphasis added).

Further, the "Supreme Court has noted that administrative rules must be statements that have legal consequences only for the future." Cal-Almond, Inc. v. Department of Agriculture, 14 F.3d 429, 442 (9th Cir. 1994) aff'd in part, rev'd in part on other grounds, 67 F.3d 874 (9th Cir. 1995) (citing Bowen v. Georgetown University Hospital, 488 U.S. 204, 217 (1988). See also, e.g., Health Insurance Assoc. of America v. Donna Shalala, 23 F.3d 412 (D.C. App. 1994), cert. denied, 115 S.Ct. 1095 (1995); NLRB v. Long Island College Hospital, 20 F.3d 76 (2d Cir. 1994). Therefore, any retroactive change of requiring licensees grant security interests to the Commission where none was before would violate the APA.

IV. PCS LICENSEES' INTEREST RATES WERE UNFAIRLY CALCULATED.

At the same time that the Commission forced PCS licensees to sign security agreements and promissory notes, the Commission stated that interest rates for the installment payments would be determined by the government's cost of money, and that government cost of money would be determined by the interest rate from ten-year Treasury bills.[6] However, the PCS licensees later learned that the Commission instead set the installment plan interest rate at the coupon rate from the most recent Treasury note auction. The coupon rate does not necessarily reflect the government's cost of money, which is reflected more accurately by the actual, effective interest rate, or yield, for the Treasury notes. In the C-Block PCS context, the difference in interest rates was nearly one half of one percent (0.5%), which has translated into $86 million in excess charges to small business licensees.[7] This Commission determination, which will have drastic financial consequences for PCS licensees, was also mandated without public notice and comment, and without even an order. Thus, in addition to seeking reconsideration of the Order, the Petitioners ask that the Commission reverse its determination last fall that PCS licensees would have to pay interest at the coupon rate rather than the Treasury bill rate.

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[6] The Commission itself has maintained that it should not set interest rates above the government's cost of money. See Second Report and Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, 9 FCC Rcd 2348, ¶ 239 (1994) (stating "we also agree with those Commenters that suggest that interest on installments should be charged at a rate no higher than the government's cost of money. We recognize that, in addition to providing a source of financing that might not otherwise be available to small entities, we should impose interest in a manner that is designed to provide significant financial assistance to small businesses.") (emphasis added).

[7] See Request for Rule Waiver of Omnipoint Corporation, Broadband PCS Block C Installment Plan Interest Rate for Small Business Licensees, 16 (December 16, 1996) (noting "[F]or Omnipoint, the difference in interest payments amounts to $17,689,446 over the ten-year term; [and] over $2,000,000 in the first year alone.").

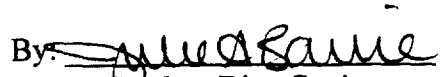
V. CONCLUSION

The Commission should not be allowed to implement a substantive change to the rights of its licensees by contravening the basic notice and comment requirements of administrative procedure. Creating such a wholesale change for licensees, without their input, is the very reason the APA and supporting case law view the procedural and practice exception cautiously. The Order should be reversed and re-submitted as a Proposed Rule-Making, and public comment should be entertained.

WHEREFORE, the Petitioners request that the Commission reconsider its Order, and submit the substantive contents of that Order to public notice and comment, as required by the APA and supporting case law.

Respectfully submitted,

Airadigm Communications, Inc.
Loli, Inc.
KMC Interactive
MAR IVDS, Inc.
New Wave, PCS
AmeriCall International, L.L.C.
Euphemia Banas

By: 

Stephen Diaz Gavin
J. Jeffrey Craven
Julie A. Barrie
PATTON BOGGS, L.L.P.
2550 M Street, NW
Washington, D.C. 20037
(202) 457-6000

Their Attorneys

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